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Supreme Court of the United States

OCTOBER TERM, 1960.

No. [redacted]. 76

BENJAMIN BLIER,

Petitioner,

v.

UNITED STATES LINES COMPANY,

Respondent.

BRIEF OF RESPONDENT, UNITED STATES LINES COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI.

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TABLE OF CONTENTS.

PAGE

POINT I.—The opinion of the United States Court of Appeals for the second circuit is not in conflict with this court's opinion in *Mitchell* v. *Trawler Racer Inc.* The trial judge correctly charged the jury on unseaworthiness in strict conformity with the Mitchell decision, including a charge that the duty is an absolute one and did not depend on defendant's notice of the grease. Petitioner made no objection to the charge 3

POINT II.—The decision of the Court of Appeals for the Second Circuit is not in conflict with the decisions of other Courts of Appeal 6

Conclusion 7

APPENDIX.

Charge of the Court 1a

Table of Cases.

	PAGE
Grzybowski v. *Arrow Barge Co. Inc.* (4 Cir. 1960), 283 F. 2d 481	6
Johnson v. *New York N. H. & H. R. Co.*, 344 U. S. 48 (1952)	1
Mitchell v. *Trawler Racer, Inc.*, 362 U. S. 539	3, 4, 5, 7
McCallister v. *Magnolia Petroleum Company*, 357 U. S. 221	7
Palmer v. *Hoffman*, 318 U. S. 109, 119 rehearing denied 318 U. S. 800	6
Puerto Seguro Cia. Neviara v. *Pettsilos*, 279 F. 2d 599 (4 Cir. 1960)	6, 7
Rotondo v. *Isthmian Steamship Co.*, 243 F. 2d 581 (2d Cir. 1957), certiorari denied 355 U. S. 834	1
United States v. *Atkinson*, 297 U. S. 157 (1936)	6

Rules Cited.

Federal Rules of Civil Procedure,	
Rule 50	1
Rule 50(b)	1
Rule 51	2, 5

Authorty Cited.

Moore's Federal Practice, Volume 5, Chapter 51, pages 2501, 2509	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 977.

BENJAMIN BLIER,

Petitioner,

v.

UNITED STATES LINES COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI.

Petitioner, a ship's purser aboard the *SS American Leader*, was allegedly injured on May 31, 1957, when he claims he stepped on grease while boarding the vessel by means of a sectional gangway which extended from the pier to the main deck of the ship.

Petitioner did not move for a directed verdict at the close of the evidence nor did he move for entry of judgment in his favor, notwithstanding the verdict. Consequently, he admitted that an issue of fact on unseaworthiness existed for the jury's determination. *Johnson* v. *New York N. H. & H. R. Co.*, 344 U. S. 48 (1952); *Rotondo* v. *Isthmian Steamship Co.*, 243 F. 2d 581 (2d Cir. 1957), certiorari denied 355 U. S. 834; Rules 50 and 50(b) of the Federal Rules of Civil Procedure. Also, petitioner did not take exceptions to the

charge given by the court, including the portion of the charge of which he now complains. In sum, the issues were submitted to the jury without appropriate objections by petitioner and a verdict was returned for the respondent.

Moreover, the trial court's charge was proper in all respects. Contrary to petitioner's misstatement (p. 4 of Petition), the trial court submitted to the jury the question of whether the presence of the grease, if it did exist, rendered the vessel unseaworthy and it explained in explicit terms that if a finding of unseaworthiness was made, then respondent's liability "is an absolute one. That is, it does not depend upon any showing that the defendant or its employees knew or had reason to expect that grease was on the steps of the gangway, or that defendant knew that the steps would be used when such grease was on there." (Respondent's Appendix p. 2a).

Furthermore, petitioner did not take appropriate exceptions to any part of the charge as given by the trial court and is, therefore, barred from now asserting a claim of error. (Rule 51 of the Rules of Federal Procedure, discussed p. 5 *infra*). Petitioner argues that the trial court granted him exceptions to its refusal to give further illustrations of unseaworthiness to the jury. But clearly the court's failure to give examples of unseaworthiness beyond the particular facts involved (grease on the steps of the gangway) was justified, and in any event petitioner's exception to this omission certainly does not constitute an exception to the charge actually given and of which petitioner now complains. (Petition p. 8). As to the charge complained of, it is uncontroverted that petitioner took no exception. Indeed, it is conceded on page 9 of petitioner's brief to the Court of Appeals that petitioner's counsel had been lax in not excepting to the charge.

POINT I.

THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IS NOT IN CONFLICT WITH THIS COURT'S OPINION IN *Mitchell v. Trawler Racer Inc.* THE TRIAL JUDGE CORRECTLY CHARGED THE JURY ON UNSEAWORTHINESS IN STRICT CONFORMITY WITH THE MITCHELL DECISION, INCLUDING A CHARGE THAT THE DUTY IS AN ABSOLUTE ONE AND DID NOT DEPEND ON DEFENDANT'S NOTICE OF THE GREASE. PETITIONER MADE NO OBJECTION TO THE CHARGE.

The entire charge of the court is set forth in respondent's appendix, *infra* pages 1a to 7a.

Plainly, the court accurately charged the jury on the two theories of recovery, viz. negligence and unseaworthiness, and it pointed out in the fifth paragraph of its charge that one of plaintiff's theories "is that the vessel is what is known in the terms of the law as unseaworthy, due to the claim that there was grease on the steps of the gangway". (Respondent's Appendix 1a).

The court explained in paragraph seventh of its charge what is meant by unseaworthiness as "directed to the present case" (Respondent's Appendix 2a):

> "First I will try to explain to you the term 'unseaworthiness'. The owner of a vessel has an absolute duty to provide a seaworthy vessel. This means that the defendant was obligated to furnish and maintain safe working conditions. Seaworthiness is reasonable fitness for the particular voyage, or directed to the present case, reasonable fitness for the particular uses which the plaintiff was making of the ship at the time of his alleged injury."

The court then in paragraphs eighth and ninth applied the law of unseaworthiness to the particular condition alleged, i.e. grease (Respondent's Appendix 2a):

> "In considering whether the vessel was unseaworthy due to the presence of grease on the steps of the gangway, the following rules should be followed:
>
> A vessel is not unseaworthy by reason of a temporary condition, if even so the vessel was reasonably safe and suitable. In order to be seaworthy, a vessel need not meet a standard of perfection. It need only be reasonably safe for the purpose to which it is to be put."

And the court in paragraph tenth charged the jury that if unseaworthiness was found because of grease on the gangway defendant's liability was an absolute one (Respondent's Appendix p. 2a):

> "If you do decide that the vessel was unseaworthy, then its liability is an absolute one. That is, it does not depend upon any showing that the defendant or its employees knew or had reason to expect that grease was on the steps of the gangway, or that the defendant knew that the steps would be used when such grease was on there."

The Court of Appeals in affirming the judgment found that the trial court's "instructions to the jury were wholly unexceptionable" and "that they are in strict conformity with the teaching of *Mitchell*" (*Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539). The Court of Appeals pointed out the *Mitchell* case requires that there must be a complete divorcement of unseaworthiness liability from concepts of negligence, i.e. if unseaworthiness is found the shipowner's duty is an absolute one and it is liable regardless of notice. In the instant case, the trial court so charged. (Respondent's Appendix p. 2a).

The Court of Appeals also pointed out that the *Mitchell* case held that the duty of the shipowner is not to furnish

an accident-free ship but only to furnish a vessel and appurtenances reasonably fit for their intended use. Mr. Justice Stewart in delivering the opinion in the *Mitchell* case stated (362 U. S. 539 at page 550):

> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. Boudoin *v.* Lykes Bros. S.S. Co., 348 U. S. 336."

Clearly, therefore, the trial court correctly charged the jury that the "vessel would not be unseaworthy by reason of a temporary condition, if even so the vessel was reasonably safe and suitable." (Respondent's Appendix p. 2a).

Petitioner makes the illusory argument that the trial court by the mere use of the word "temporary" misguided the jury by suggesting a different standard applied than to a "permanent condition". But the plain fact is that the court by explicit language accurately defined to the jury the applicable standards of unseaworthiness, namely, that the duty is an absolute one, that it does not depend on notice and that the vessel need only be reasonably safe and suitable.

In any event, (although the trial court allowed petitioner exceptions to its failure to give further examples of unseaworthiness) petitioner did not except to the instructions actually given by the trial court including the charge of which petitioner now complains. (Petition page 8).

Rule 51 of the Federal Rules of Civil Procedure which refers to instructions to the jury states:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." (For discussion, see Moore's Federal Practice, Volume 5, Chapter 51, pages 2501, 2509.)

In *Palmer* v. *Hoffman*, 318 U. S. 109, 119 rehearing denied 318 U. S. 800 and *United States* v. *Atkinson*, 297 U. S. 157 (1936) this Court held that in the absence of exceptional circumstances, error in a jury trial which was not brought to the attention of the trial court by proper exception or request to charge will not be considered on appeal.

POINT II.

THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL.

Petitioner relies on the case *Grzybowski* v. *Arrow Barge Co. Inc.*, 283 F. 2d 481 (4 Cir. 1960), wherein the Court of Appeals for the Fourth Circuit found error. As pointed out by the opinion of the Second Circuit, however, the reason for the reversal in *Grzybowski* was that the trial judge made certain remarks to the jury which failed to measure up to the requirement that unseaworthiness liability be completely divorced from "concepts of negligence".

Petitioner also cites *Puerto Seguro Cia. Neviara* v. *Pettsilos*, 279 F. 2d 599 (4 Cir. 1960). In the *Seguro* case the defendant shipowner argued that a mere transitory condition would not give rise to a cause of action. This was never contended in the instant case nor did Judge

Dimock so charge. In *Seguro* the Court of Appeals for the Fourth Circuit held that liability for a transitory condition is not different from liability that attaches when the condition is permanent. The case clearly follows *Mitchell* and in no way conflicts with the decision below or with the trial judge's charge in the matter before this Court.

Petitioner refers to the case of *McCallister* v. *Magnolia Petroleum Company*, 357 U. S. 221, wherein this Court held that the trial court's instructions implied that plaintiff could recover for unseaworthiness only if the defect rendered the whole vessel unfit for the purpose for which it was intended. No such question is presented in this case.

Conclusion.

There is no unique question of maritime law presented and the issues raised were reviewed and fully dealt with in the decision of the Court of Appeals for the Second Circuit, which denied petitioner's appeal.

There is no basis to petitioner's contention that there is a question of conflict.

Furthermore, the court below properly found that there was no error with respect to the trial judge's charge. In any event, there is no reversible error because of plaintiff's failure to make objection.

The Petition for Writ of Certiorari Should be Denied.

Respectfully submitted,

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Counsel for Respondent.

Kirlin, Campbell & Keating,
William R. Mackey,
Of Counsel.

APPENDIX.

Charge of the Court.*

DIMOCK, J.

Ladies and gentlemen, under our system of justice the judge has a function and the jury has a function. It is my duty as judge to instruct you as to the law that applies in this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive function to determine the facts in the case. Just as you cannot encroach on my function, I cannot encroach on yours. You are the sole judges of the facts. It is not what counsel on either side have said, nor what I may say as to what the facts in the case are, but it is your recollection and judgment on the facts that must govern.

With that introduction I will try to describe the case to you.

It is brought by the plaintiff, Benjamin Blier, against the defendant, United States Lines Company. The claim is alleged to arise out of an accident which is said to have occurred while the plaintiff was employed on the S S *American Leader*, owned and operated by the defendant.

The plaintiff seeks to recover for personal injuries that he says he sustained in the course of his employment as a ship's purser and a member of the crew.

This claim is based on two separate theories, either one of which if proved would be sufficient to support a verdict for the plaintiff if the other elements of the case were there. One of these theories is that the vessel is what is known in the terms of the law as unseaworthy, due to the claim that there was grease on the steps of the gangway.

The second theory is the claim that the defendant, acting through its employees, was negligent in failing to remove grease from the steps upon which plaintiff claimed that he slipped and twisted his ankle.

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* Portions of charge concerning defenses and damages omitted.

Charge of the Court.

First I will try to explain to you the term "unseaworthiness". The owner of a vessel has an absolute duty to provide a seaworthy vessel. This means that the defendant was obligated to furnish and maintain safe working conditions. Seaworthiness is reasonable fitness for the particular voyage, or directed to the present case, reasonable fitness for the particular uses which the plaintiff was making of the ship at the time of his alleged injury.

In considering whether the vessel was unseaworthy due to the presence of grease on the steps of the gangway, the following rules should be followed:

A vessel is not unseaworthy by reason of a temporary condition, if even so the vessel was reasonably safe and suitable. In order to be seaworthy, a vessel need not meet a standard of perfection. It need only be reasonably safe for the purpose to which it is to be put.

If you do decide that the vessel was unseaworthy, then its liability is an absolute one. That is, it does not depend upon any showing that the defendant or its employees knew or had reason to expect that grease was on the steps of the gangway, or that the defendant knew that the steps would be used when such grease was on there. You will remember that the plaintiff also claims recovery on the ground that the defendant was negligent in that its employees failed to remove grease from the steps on which he was allegedly injured.

I shall try to explain to you what the term "negligence" means.

In its relation to the plaintiff the defendant had a duty to exercise through its employees' ordinary care. Ordinary care is that which would be the conduct of a reasonable and prudent person under similar circumstances. It is a breach of that duty of ordinary care if defendant's employees conducted themselves either through action or failure to act in such a manner as to create a risk of injury to the plaintiff which a reasonable and prudent person

would have anticipated and guarded against under similar circumstances.

If you find that acts of employees of the defendant, or failure to act, created a risk of harm to the plaintiff which reasonable persons similarly situated would have anticipated and guarded against, that would mean that you find the defendant negligent.

In this connection you must decide whether any grease which was on the steps had been there long enough so that reasonable persons would have discovered it and removed it.

You are not to guess or to speculate as to whether the ship was unseaworthy or the defendant was negligent, nor can you regard the mere fact of the accident as a basis for finding the defendant responsible. Your determination must be based upon facts or reasonable inferences from facts.

It is important for you to bear in mind that a finding of unseaworthiness of the vessel or negligence of the defendant without more is not enough to hold the defendant liable in damages.

Its liability also depends on whether the unseaworthiness or negligence was a proximate cause of injury. To be a proximate cause there must be a direct causal connection between the unseaworthiness or negligence and the injury. In other words, there must be an unbroken chain of events flowing from the unseaworthiness or negligence and leading to the injury. Assuming that you found the vessel unseaworthy or the defendant negligent, you must then decide whether there was this causal connection between the unseaworthiness or negligence and injury to the plaintiff.

Applying that to the facts of this case, if you find that there was a direct causal connection between plaintiff's broken ankle and an accident for which the defendant was responsible, the broken ankle would be a proximate result of the accident.

Charge of the Court.

The next thing that I will take up with you is the matter of burden of proof. The plaintiff has the burden of proof to establish the essential elements of his claim. Thus, the plaintiff has the burden of proving that the ship was unseaworthy or the defendant was negligent and that any unseaworthiness or negligence of the defendant was a proximate cause of an injury to the plaintiff. If the plaintiff fails to establish that the ship was unseaworthy or that the defendant was negligent and that this was the proximate cause of an injury to the plaintiff, then your verdict must be for the defendant and you need go no farther in your deliberations. But if you do find that the plaintiff has established these matters, the defendant would then have the burden of proof to establish its claim of contributory negligence, which I will discuss with you later.

The party who has the burden of proof on a particular issue must prove by a fair preponderance of the evidence the necessary elements of his claim. This preponderance is determined by your weighing the credible and convincing evidence tending to prove a given element of the claim, and the credible and convincing evidence tending to disprove it. That is done in your mind just as a chemist would weigh two physical substances in a balancing scale. If the evidence tending to prove a particular claim of a party weighs more in your mind than the evidence tending to disprove it, then that party has sustained his burden of proof.

• • • • • •

You are to decide the case from the evidence and the evidence alone, and you are not to be influenced by any assumption, conjecture or any inference not warranted by facts proved to your satisfaction.

Your oath sums up your duty, and that is that you will well and truly try the issues between these parties, without fear or favor to any man, according to the evidence given to you in court and the laws of the United States.

Will counsel approach the bench, please.

Charge of the Court.

(The following took place at the bench without the hearing of the jury:)

The Court: Have you any exceptions?

Mr. Heller: No exceptions, but I just would like to point out will you please elucidate and give some examples of unseaworthiness, that the vessel should provide a safe place to walk, in addition to a safe place to work.

The Court: They would think that the man was working when he was walking.

Mr. Heller: That is the thought that struck me; he was walking to his work.

The Court: I don't think that I ought to add anything further; it seems to me that that is clear enough.

Mr. Heller: What about some examples of unseaworthiness? The jury might be of the opinion that unseaworthiness means only that a ship has not got a good hull or a good mast.

The Court: No. They would know that I would not have submitted the matter to them if there was not a question of unseaworthiness. I will give you an exception to both of your requests.

Mr. Heller: No examples of unseaworthiness?

Mr. Mackey: No exceptions, your Honor.

(The following took place within the hearing of the jury:)

(Marshals sworn.)

The Court: Ladies and gentlemen, it is just about lunch-time and you may well wish to go to lunch before you begin your deliberations. That is entirely within your determination as to whether or not you would prefer to talk a little while before you go to lunch.

Juror No. 8: Could I ask a question of you?

The Court: You can ask a question.

Juror No. 8: In what form will your Honor's charge be made available to us?

Charge of the Court.

The Court: If you need any portion of it, you can come back and tell us or send a note and tell us what portion you would wish and it will be read to you, or if it is unintelligible to you and you are sure that just reading it again is not what you want, formulate a question to the Court and the Court will try to answer that, and that can be done by sending a note to the Court.

You may then go to lunch now and thereafter retire for your deliberations.

(The jury was sent to lunch at 12.55 p. m. and thereafter began its deliberations.)

(The jury returned into the courtroom at 3.45 p. m.)

(Roll call of jurors.)

The Clerk: Mr. Foreman, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: How do you find?

The Foreman: The jury finds for the defendant, U. S. Lines.

The Clerk: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded:

You say you find in favor of the defendant and so say you all.

(The jury replied in the affirmative.)

The Court: Thank you very much for your services, ladies and gentlemen. For what interest it might have for you, my verdict would have been the same as yours in this case.

I will ask you to be back at 9.00 o'clock tomorrow morning.

The Clerk: Report to Room 109 at 9.00 o'clock tomorrow morning.

(The jury was dismissed.)

Defendant's Requests to Charge.

Mr. Heller: The plaintiff moves to set aside the verdict of the jury as contrary to law and contrary to the evidence.

The Court: Motion denied.

Mr. Heller, you did everything that could be done with your case, I think. I don't think anybody could have won it.

Mr. Mackey: Thank you, your Honor.

(Trial concluded.)